IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10410 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

GUJARAT STATE ROAD TRANSPORT CORPORATION

Versus

MADHAVSINGH B PARMAR

Appearance:

MR KS JHAVERI for Petitioner

MR JS BRAHMBHATT for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 03/05/2000

ORAL JUDGEMENT

Learned Advocate Mr.K.S.Jhaveri appearing on behalf of the petitioner Corporation and Learned Advocate Mr.J.S.Brahmbhatt appearing on behalf the respondent workmen. Rule. Learned Advocate Mr.J.S.Brahmbhatt appearing on behalf of the respondent workmen waives service of rule and with the consent of both the learned

advocates, the matter has been taken up for final hearing today and the same is heard finally today.

2. In the present petition, the order passed by the Industrial Tribunal in Approval Application No. 159 of 1997 dated 12.7.1999 has been challenged by the petitioner Corporation.

3. The brief facts of the present petition is that the respondent workmen was working as a conductor Badge No.5959 in Junagadh Division at Veraval Depot. On 6.1.95 when the respondent workman was working as a conductor in Una-Veraval via Gir Gadhada. At that time his bus was checked by Depot Manager, Keshod with line checking staff at Pichhavi. At that time the allegations against the respondent workman that there is one group of 5 passengers travelling from Gir Gadhdha to Pichhavi, though fare was collected by the respondent workman from the passengers to upto the checking point Gir Gadhada were not issued by the workman. Therefore, the chargesheet was served to the respondent workman and thereafter the respondent workman has submitted his reply on 25.2.95 and on 26.5.95 the Reporter Shri K.G.Joshi, ATI was examined in the departmental inquiry which was cross-examined by the representative of the respondent workman and thereafter the respondent workman was examined by the Inquiry Officer. After the completion of the departmental inquiry, the Competent Authority has come to the conclusion that the misconduct alleged against the respondent workman were found to be proved and therefore second show cause notice was served to the respondent workman dated 27.5.96 alongwith the copy of the finding and thereafter the respondent workman was dismissed from service on 9.4.97. At the time of dismissal the industrial dispute pending before the Industrial Tribunal Reference I.T.No.14/96 and therefore the approval application under Section 33(2)(b) of the Industrial Disputes Act, 1947 had filed by the petitioner Corporation being Application No. 159 of 1997. The Approval Authority Industrial Tribunal has considered the merits of the matter. Before the Industrial Tribunal, the reply was submitted by the respondent workman and challenged the legality and validity of the departmental inquiry and also challenged that the Competent Authority has acted prosecutor and judge which violated the principles of natural justice. The respondent workman has also challenged that the Reviewing Authority has committed error in reviewing the case during the pendency of the departmental appeal and therefore the punishment of dismissal is contrary to the principles of natural justice. Before the Tribunal none of the parties has

laid any oral evidence and petitioner Corporation has produced relevant documents relating to the departmental inquiry and thereafter the matter has been heard by the Industrial Tribunal. The Tribunal after considering the submission of both the learned advocates has come to the conclusion that in departmental inquiry the reasonable opportunity was not given to the respondent workman and Competent Authority has acted as a prosecutor and judge which violated the principles of natural justice. The Industrial Tribunal has also come to the conclusion that even against the past record no reasonable opportunity was given to the respondent workman and there is no evidence on record which proved the fact that one month notice pay was paid to the respondent workman. Therefore considering all these aspects, the Industrial Tribunal has rejected the approval application submitted by the petitioner Corporation by order dated 12.7.99. The result of rejection of approval application is that the dismissal order passed by the petitioner Corporation cannot came into effect and same is considered to be abinitio void and respondent workman is entitled to reinstatement with continuity of service and with full back wages of the interim period.

4. Learned Advocate Mr.Jhaveri has submitted that past record of respondent workman has been produced before this Court from Page 22 to 32 in all more than 40 incidents have been committed in thee past and most of cases wherein similar incidents of collecting far and not issuing the tickets to the passengers were found. According to his submission out of 35 misconducts in the past committed by the respondent workman, 23 defaults are relating to similar type of misconduct which proved the mensrea of the respondent. He submitted that the past record has not been considered by the Industrial Tribunal while examining the matters on merits. According to Mr.Jhaveri, the Tribunal has committed gross error in not considering the past record and considering some irrelevant records and come to incorrect conclusion and Industrial Tribunal has no power to go into the merits of the matter but it has to only examine the prima facie case proved against the workman or not but instead of that the Industrial Tribunal has examined the matter on merits as if he is exercising the powers under Section 10 of the Industrial Disputes Act, 1947.

5. Mr.Brahmbhatt appearing on behalf of the respondent workman has pointed out that the Industrial Tribunal has rightly examined the legality and validity of departmental inquiry and also examined the question whether the principles of natural justice has been

violated by the petitioner or not and a competent authority has acted as a prosecutor and judge and Reviewing Authority has not shown the past record to the respondent workman and not given any reason by the Reviewing Authority for enhancing the punishment against the respondent workman and notice pay was not paid and not proved by the petitioner before the Tribunal. Therefore the Industrial Tribunal has rightly rejected the approval application.

6. After considering the submissions of both the Learned Advocates, the past record of the respondent workman has not been considered by the Tribunal and matter has been examined by the Tribunal on merits. Tribunal has not given any opportunity to the petitioner for proving misconduct before the Tribunal when inquiry has been declared illegal and vitiated. Therefore as a result of such conclusion, the matter must be sent back to the Tribunal for fresh decision. In such circumstances, both the Learned Advocates submitted to this Court that instead of remanding back the matter to the Industrial Tribunal for deciding the approval application. Again this Court can exercise the powers under Section 11-A of the Industrial Disputes Act, 1947 and pass appropriate orders after examining the merits of the matter. Both the Learned Advocates made joint request to this Court. Instead of remanding back the matter to the Tribunal this Court may consider the joint request to examine the merits of the matter and pass appropriate orders of punishment while exercising the similar powers under Section 11-A of the Industrial Disputes act, 1947.

7. Both the Learned Advocates relied upon the decision of the Apex Court of Workmen of Bharat Fritz Werner (P) Ltd Vs. Bharat Fritz Werner (P) Ltd reported in JT 1990 SC 305. The Apex Court has considered the similar situation and examined the decision of the Division Bench of the Karnataka High Court of K.S.R.T. Corporation Vs. B.M.Patil & Anr reported in 1996 (1) Lab IC 305. The Apex Court has observed that such acts of misconduct were not such as to deserve extreme penalty of dismissal and have directed that these workmen should be taken back on duty but with 1/2 back wages. The Learned Judges considered denial of 1/2 back wages to the workman as a sufficient punishment for the act of misconduct committed by him. The aforesaid directions have been given by the High Court while exercising the powers which are exercised by the Industrial Tribunal in view of the joint memo dated 22.6.84 submitted by both the parties whereby it was requested that the Court may decide the

entire matter without remitting to the Tribunal and grant appropriate relied finally in accordance with law. Moreover, in view of the provisions contained in Section 11-A of the Act which empowers the Industrial Tribunal to go into the question whether the order of discharge or dismissal passed against these workmen is justified or not and permits the Tribunal to set aside the order of discharge or dismissal as the circumstances of the case may require. It was open to the High Court to consider what would be the adequate punishment for the misconduct found to have been committed by these workmen and taking the view that the act of misconduct found proved against these 5 workmen were not such as to warrant dismissal and denial of 1/2 of back wages for the period of about 6 years for adequate punishment for the misconduct found to have been committed. I do not find any infirmity in the aforesaid view expressed by the Appellate Bench of the High Court.

8. In view of the observations made by the Apex Court, the Learned Advocates appearing on behalf of the respective parties jointly requested to exercise the similar powers which can be exercised by the Industrial Tribunal under Section 11-A of the Industrial Tribunal act, 1947 and pass appropriate orders in accordance with law and after examining the merits of the matter. Therefore, considering this decision of the Apex Court and the observations made thereunder, now I am examining the merits of the matter as requested by the Learned Advocates.

9. The brief facts of the allegations is that at the time of checking on 6.1.95, 5 passengers were found without tickets travelling from Gir Gadhdha to Pichva, wherein he respondent workman has recovered the fare of Rs.8.75 ps but upto the point of checking no tickets were given by the respondent workman. Before the Checking Authority, the respondent workman has given a statement on the sport wherein he gave an explanation that at the time of checking he was doing road booking and at the time when the bus was about to start these 5 passengers of one group travelling from Gir Gadhdha to Pichva had boarded and he was doing road booking. Meanwhile the bus was checked and at that time these passengers were sitting in the bus front and reverse side of the bus and therefore there was some misunderstanding between the passengers that amongst the group one of the passengers will be taking care of taking tickets from the conductor. At the time of checking, way bill was opened and the respondent workman was not well. This was the explanation given by the respondent workman on the spot

at the time of checking. Similarly in the departmental inquiry also, the respondent workman has raised a contention that his traffic cash was not checked by the Checking staff, specific allegations were made against the respondent workman that he recovered the fares from the passengers but not issued the tickets. Then a natural result must have to be reflected in the ST Cash, which was not checked by the Checking Staff. However, the defence of respondent workman and at the time of departmental inquiry which was admitted by the Reporter who was a checking inspector in the cross-examination that at the time of checking, the respondent was not in good health and passengers were sitting front and reverse side of the bus and he was doing road booking. Meanwhile his bus was checked by the Checking Staff. Another aspect has also been examined by the Reporter that way bill was opened at the time of checking and a distance from Gir Gadhdha to Pichva would be about 1 and 1/2 stage which comes to 9 kms from where the passengers had boarded. Therefore within 9 kms, the bus was checked by the Checking Staff and these allegations were made against the respondent workman. The Competent Authority after completion of the departmental inquiry and considering the past record of 35 incidents in the past and similar 23 incidents of same nature, the Competent Authority has imposed the punishment by order dated 11.6.96 to put the respondent workman reverting him back to the initial pay of the conductor category. Against the said punishment order dated 11.6.96, the respondent workman has filed First Appeal to the Divisonal Controller who is the first Appellate Authority. During the pendency of the first appeal, the First Appellate Authority who is the reviewing authority under clause 9 of the ST Procedure has reviewed the decision and issued show cause notice to the respondent workman by order dated 12.2.97 for enhancement of punishment upto dismissal. The reply was submitted by the respondent workman on 24.2.97. Thereafter on 3rd March, 1997 the personal hearing was conducted by the Reviewing Authority and ultimately the Reviewing Authority has decided to dismiss the respondent workman from service by order dated 9th April, 1997. The Reviewing Authority mainly considered the past record of the respondent workman and enhanced the punishment and dismissal. The past record of the respondent workman was not disclosed before the Respondent Workman by the Reviewing Authority. The effect of punishment imposed by the Competent Authority that the respondent workman had joined the service in the year 1972 and he has lost a 25 years service by punishment imposed on 11.6.96 to put him in the initial pay of the conductor which is a permanent loss upto

retirement and which is having adverse effect on the retirement benefits. Even such harsh punishment is also not considered by the Reviewing Authority proper and only considering the past record of the respondent workman has imposed the punishment of dismissal.

10. In the present case, the misconduct which is not considered to be serious in light of the fact that explanation given by the respondent workman on the spot to the Checking Staff which has been admitted by the Reporter in the cross-examination has been considered to be true defence of the respondent workman. The bus was checked within 9 kms and at the time of checking the respondent workman was doing road booking, way bill was opened and traffic cash was not checked by the Checking Staff. These are the factors undisputed between the parties. However, one another aspect is that these 5 passengers are not of different group but they are of one group. Therefore one transaction to recover the fare and to issue the ticket is enough and therefore this is not a case in which from different 5 passengers the workman has collected the fare and not issued the tickets but it was a case of one group of 5 passengers wherein one transaction is for recovering the fare and not issuing the tickets. In such circumstances, the statement of the respondent workman has been admitted by the Reporter and therefore, considering the misconduct as it is, this is not a case in which a serious punishment of dismissal is required to be imposed by the Reviewing Authority.

11. The misconduct for which the extreme punishment visited the worker is causing to very negligible loss to the employer. A serious question that arises in such case would be, besides the legality of the punishment, the morality of imposing such a severe punishment as well. While imposing a punishment the employer should first consider whether the delinquent committed the offence with intent to make unlawful gain and to pilfer the revenue of the employer. Was it with intention to gain Rs.8.75 paise that the worker committed the present misconduct? Was he in such a depraved circumstance that he desired to make an illegal gain of a trivial amount of Rs.8.75 paise? What was the number of passengers travelling in the bus and is it possible that he would have accidentally omitted to issue tickets? Is it not possible that while he was in the process of issuing tickets,, the five persons might have boarded the bus? I have come across such cases where such omissions take place in buses loaded with more than the permitted number of passengers. Such may be cases of human error committed by the Conductor while issuing tickets to

passengers travelling in a bus with passengers much more than the permitted number. The Disciplinary Authority should keep in mind all facts of the problem before it awards the extreme penalty of dismissal. A misconduct like the above on several instances is not committed insistentionally. It is too much to imagine that a worker would have omitted to issue tickets deliberately to gain few rupees at the risk of his job. More often, it is due to the crowd in the bus that he misses to issue tickets than a desire by him to gain few rupees. The casastrophe that may befall is more serious that what is sought to be prevented. First it visists the employee. He is rendered jobless. It generates a litigation which in the present pattern spreads over years producing ultimately a disgruntled employee. Actually the real victim of any such punishment is the family of the worker whose breadwinner is jobless. the future is rendered bleak to them and it in its turn causes greater hardship to the society than it intended to cure. That apart he Management also shares the losses in another way. when the worker is dismissed, someone else will have to be placed in his place to discharge the duties. And if the worker is ordered to be reinstated ultimately with back-wages, virtually there will be double payments i.e. two persons, would have to be paid for a single job. In the case of a public sector undertaking, the loss is passed on to the common man, the tax payer. The question then would be in the case of a conductor who has a past history, should the employer ignore the same? This is a case, the remedy for which the employer himself should discover and the solution is not far to discover. In the case of a ticketless traveller the Management has designed a method to curb the same by imposing fine on them. The object with which this is done is so that he may not repeat travelling in the bus without tickets. This method can certainly be considered of imposing of penalty on the Conductor himself who is discovered to be intentionally pilfering the revenue of the Corporation. I amy notice that in these cases of non-issue of tickets, I amy take note of the fact that there are two parties joining to commit the misconduct, i.e. the Conductor and the passenger. If the Conductor wants to make an unlawful gain, then he has to collect the fair and fail to issue tickets. In such an events, the passenger who boards the bus must cooperate with the Conductor. If he has to co-operate, then he should be familiar to the Conductor and he should agreed to be aparty to commit the misconduct at the risk of paying penalty in the event of being caught by the inspecting staff. It is too much to imagine that the conductor will hatch a conspiracy to pilfer revenue of the Corporation as and when stray

passengers board the bus at various stages. If the Conductor wants to make an illegal gain by the omission to issue tickets, the passenger has to be condescending party. This is really unlikely. Hence, the benefit of doubt in cases of stray lapses should be that the omission to issue tickets may be accidental. Hence, the disciplinary authority should reserve the punishment of dismissal only in extreme cases. It is where the exercise of discretion by the disciplinary authority steps in. It cannot and should not act like a robot, it justice should be moulded with humanism and understanding. It should really assess each case on its own merit. the fact that on a past occasion the delinquent might have acted in a particular manner does not mean that on the particular occasion as well he would have acted with intent to cause loss to the employer. Each set of facts should be decided with reference to evidence regarding the said allegations and those allegations should be the basis of the decision. May be, the pas conduct of the worker may be a ground to assume that the delinquent may have had propensity to commit the misconduct and to assess the quantum of punishment to be imposed. But that by itself cannot provide any foundation to hold that the present conduct of the worker is a misconduct.

12. In the present case, ultimately there is a default numbering 35 in respect to which the employer had occasion to impose punishment. This is not a disputed fact as well. May be the charges with respect to the above said default would be innocuous or minor. In several cases, it may not be the intention of the respondent to commit any misconduct. He might have admitted his guilt as well. As can be seen from the history sheet in several cases 2 to 3 passengers were not issued ticket. It would be harsh to take those circumstances while imposing the punishment. It must be stated that in these cases, it clearly states that the worker has been negligent in discharging his duties.

13. Recently, the Apex Court has decided the case of conductor in the case of U.P.State Road Transport Corporation and others Vs. Maheshkumar Mishra and others reported in 2000 Lab. I.C. 1031. The relevant paras 5 to 11 are relevant which are quoted as under:-

"5. The Bus which was checked by the Transport Inspector was meant to ply within the District of Allahabad and was not a long distance Bus. The allegation against the respondent was that though the passengers had boarded the Bus at the "High

Court" for "Manauri" for which they should have been charged Rs.1.80, they were issued tickets from "Zero Road" to "Manauri" and they were charged only Rs.1.50. The only evidence on the basis of which the respondent was punished as the way bill and the tickets which had not been punched. The passengers were not examined at the trial nor was the statement of any passenger recorded at the time when the Bus was checked so that it could ascertained whether they had boarded the Bus at the "High Court" or at "Zero Road". Reliance was placed by the disciplinary Authority and the Tribunal on the report of the Transport Inspector which also bears the signature of the respondent. This document was relied upon by the Disciplinary Authority as also by the Tribunal on the ground that if the contents of the report were not correct, the respondent ought not to have signed the report and he should have protested then and there. Since this was not done, the inference drawn by the Disciplinary Authority as also by the Tribunal was that whatever was written in the report was correct and it was on that basis that the respondent was held to be guilty.

6. It was in the background of these circumstances that the High Court exercised its discretion under Article 226 of the Constitution and interfered with the quantum of punishment inflicted by the Disciplinary Authority. It may be that the order of dismissal was held to be valid and proper by the U.P. State Public Services Tribunal but the Tribunal also overlooked the fact that though sufficient evidence could have been collected at the spot to indicate that the passengers to whom tickets were issued by the respondent had boarded the Bus at the "High Court" and not at "Zero Road" but this was not done. It was a Bus plied in the City itself and, therefore, the passengers, who were available in the Bus, being local passengers could have been approached at the spot for stating whether they had boarded the Bus at the "High Court" or at "Zero Road." Learned Counsel for the appellants has placed reliance upon an unreported decision of this Court in Civil Appeal No. 9754 of 1995, arising out of SLP (C) No. 1960 of 1995 (U.P. State Road Transport Corporation Vs. Om Prakash Pandey), in which the order of the High Court, by which interference

was made with the punishment inflicted upon the delinquent employee of the Corporation, was set aside. This case is clearly distinguishable on the ground that a number of passengers were allowed to travel without tickets and, therefore, the misconduct imputed to the employee was serious. This is not the case here as the respondent who were found travelling in the Bus, but the dispute was only with regard to the sport or place at which they had boarded the Bus. To put it differently, the dispute was whether they had boarded the Bus at "Zero Road" or at the "High Court". In these circumstances, the High Court was justified in interfering with the quantum of punishment.

7. A Three Judge Bench of this Court in B.C.Chaturvedi V. Union of India (1995) 6 SCC 749 (1995 AIR SCW 4374: AIR 1996 SC 484: 1996 Lab IC 462) laid down as under (Para 18 of AIR, Lab IC):-

"A review of the above legal position would establish that the disciplinary authority, and on appeal the appellate authority, being fact-finding authorities have exclusive power to consider the evidence with a view to maintain discipline. They are invested with the discretion to impose appropriate punishment keeping in view the magnitude or gravity of the misconduct. The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof."

8. This will show that no only this Court but also the High Court can interfere with the punishment inflicted upon the delinquent employee, if penalty, shocks the conscience of the Court. The law, therefore, is not, as contended by the learned counsel for the appellants, that the High Court can, in no circumstance, interfere with the

quantum of punishment imposed upon a delinquent employee after disciplinary proceedings.

9. Another Three Judge Bench of this Court in Colour-Chem Ltd. V. A.L.Alaspurkar, (1998) 3 SCC 192: (1998 AIR SCW 709: AIR 1998 SC 948: 1998 Lab IC 974), has also laid down the same proposition and held that if the punishment imposed is shockingly disproportionate to the charges held proved against the employee, it will be open to the Court to interfere.

10. As pointed out earlier, the order of the High Court though extremely brief, must have been based on overall consideration of the facts of the case and it must have exercised its jurisdiction only when it was shocked to notice that though all the passengers had been issued tickets, the only dispute was with regard to the point at which they had board the Bus for which the punishment of dismissal from service was highly disproportionate.

11. We have already noticed above that instead of charging a fare of Rs.1.80, the respondent had charged a fare of Rs.1.50 from the passengers. While the appellants maintained that the passengers had boarded the Bus at the "High Court" and were to alight at "Manauri", the respondent contended that the passengers had boarded the Bus at "Zero Road" and were to get down at "Manauri" and therefore, he had rightly charged Rs.1.50 from those passengers. This fact could have been established beyond doubt if any of those passengers was examined at the domestic enquiry, or the Transport Inspector, who checked the Bus, could have recorded their statement at the spot. This was not done and the reliance was placed only upon the report of the Transport Inspector which was signed by the respondent also. It was not a case where the passengers were allowed to travel without tickets so that the amount of fare charged from the passengers could be pocketed by him."

14. Therefore, considering all these aspect of the matter and defence of the respondent workman has been admitted in the cross-examination and at the time of checking when the respondent was doing road booking and having more than 25 years of service of the respondent workman, traffic cash was not checked and a distance of

about 9 kms. from where passengers boarded and the bus was checked. These are the circumstances which do not justify the punishment of dismissal. Therefore, considering all these aspects and merits of the matter, I am of the view that the punishment of dismissal is harsh, unjustified and arbitrary. As well as said punishment of dismissal imposed is shockingly disproportionate to the charges held to be proved against the respondent and said punishment shocks the conscience of the Court.

15. However, considering the past record about 35 defaults which are on record produced by the petitioner Corporation, most of the cases wherein a minor penalty has been imposed about fine of Rs.3, 21, 31, 51, scolded and some of the increments were stopped with and without cumulative effect. Therefore, considering these past records and length of service of 25 years, according to my opinion, if back wages for the interim period from the date of dismissal 9.4.97 till the date of decision of Approval Authority i.e. 12.7.99 is denied by way of penalty to the respondent workman and over and above his 2 increments stopped with cumulative effect which would meet the ends of justice. Therefore, according to my opinion, the petitioner Corporation is directed to reinstate the respondent workman in service with continuity of service without backwages of the interim period from the date of dismissal dated 9.4.97 till the date of decision 12.7.99 and stoppage of 2 increments with cumulative effect and respondent workman is entitled to full back wages from the order passed by the Industrial Tribunal i.e. 12.7.99 till the date of actual reinstatement. Therefore, in view of this fact, the order passed by the Industrial Tribunal in Approval Application NO. 159/97 dated 10.7.99 is hereby quashed and set aside with a direction to the petitioner Corporation to reinstate the respondent workman in service with continuity of service without back wages for the interim period from the date of dismissal i.e. 9.4.77 till the date of order passed by the Industrial Tribunal dated 12.7.99 and respondent workman is entitled to full wages from the date of order passed by the Approval Authority i.e. 12.7.99 till the date of actual reinstatement with stoppage of punishment of 2 increments with permanent effect. Accordingly, it is directed to the petitioner Corporation to reinstate the respondent workman in service within a period of 4 weeks from the date of receiving certified copy of the order and it is further directed to pay full wages to the respondent from 12.7.99 till the date of actual reinstatement within a period of six weeks from the date of receiving certified copy of this order. The present petition is partly

allowed. Rule is made absolute to that extent.

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